

NO. PD-0853-19

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
10/31/2019
DEANA WILLIAMSON, CLERK

ROBERT HERRON

APPELLANT

V.

THE STATE OF TEXAS

APPELLEE

THE STATE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-17-00239-CR**

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TRIAL COURT: 205th Judicial District Court of El Paso County, Texas, Honorable Francisco X. Dominguez, presiding

COURT OF APPEALS: Eighth Court of Appeals, Honorable Chief Justice Brian Quinn (sitting by assignment), Justice Yvonne T. Rodriguez, and Justice Gina M. Palafox

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Robert Herron (“Herron”) was indicted for failing to register as a sex offender. (CR:7).^{1, 2} The parties having waived their right to a jury trial, the case proceeded to trial on the merits before the bench; the trial court found Herron guilty as charged and, pursuant to the indictment’s habitualization allegations, sentenced him to 25 years’ confinement. (CR:7, 87); (RR:81-82). Herron timely filed notice of appeal. (CR:92-93).

On July 31, 2019, in an unpublished opinion, the Eighth Court of Appeals reversed Herron’s conviction and rendered a judgment of acquittal. *See Herron v. State*, No. 08-17-00239-CR, 2019 WL 3451031, at *5 (Tex.App.–El Paso July 31, 2019, pet. granted)(not designated for publication). Specifically, the Eighth Court held that the State had failed to prove that, under Chapter 62 of the Code of Criminal Procedure, Herron had a duty to register with the El Paso County Sheriff’s Office, as alleged in the indictment. *See id.* at *5. No motion for

¹ Throughout this brief, references to the record will be made as follows: references to the one-volume clerk’s record will be made as “CR” and page number; references to the one-volume reporter’s record will be made as “RR” and page number; references to the one-volume supplemental reporter’s record will be made as “SRR” and page number; and references to exhibits will be made as either “SX” or “DX.”

² As reflected in the filings and proceedings in the trial court, the correct spelling of the appellant’s last name is “Herron.” *See, e.g.*, (RR:5); (CR:7, 13-15). However, on appeal, the State referred to the appellant as “Harron,” the spelling of his name as reflected in the appellate style of the case. The State notes that, thereafter, in its opinion, the 8th Court of Appeals utilized the correct spelling of the appellant’s name, and thus, the State will hereafter do the same.

rehearing was filed by the State.

The State timely filed its petition for discretionary review (PDR) on August 15, 2019. This Court granted the State's PDR on October 9, 2019, with the notation that oral argument will not be permitted.

SOLE GROUND FOR REVIEW

In holding the evidence legally insufficient to support the defendant's conviction for failing to register, specifically, that the State failed to prove that the defendant had a duty to register with the El Paso County Sheriff's Office, where there was at least "some evidence" (and specifically, direct evidence of the fact) that the Sheriff's Office was the "local law-enforcement agency" with which Herron was required to register, rather than decide merely whether there was legally sufficient evidence that, when viewed in its proper context and in the light most favorable to the verdict, could support a rational inference that Herron was, indeed, required to register with the Sheriff's Office, the Eighth Court improperly required the State to meet its evidentiary burden via the Court's preferred manner of evidentiary proof, effectively increasing the State's burden.

STATEMENT OF FACTS

The indictment

On August 2, 2016, Herron was indicted for failing to register as a sex offender. (CR:7). The indictment alleged, in pertinent part, the following:

[T]hat...[Herron]...,while being a person required to register with **the local law enforcement authority, to-wit: El Paso County Sheriff**, in the county where the defendant resided or intended to reside for more than seven days, to-wit: El Paso,..., intentionally or knowingly fail[ed] to register with the **local law enforcement authority in said El Paso County....**

(CR:7)(emphasis added).

The January 26, 2016, and February 4, 2016, pre-release and registration forms

At trial, sex-offender-unit parole supervisor Laura Spink (“Ms. Spink”) testified that earlier that year, on February 2, 2016, following his confinement for a felony drug offense, Herron was released on parole and required to report to a halfway house located at “1700 Horizon Boulevard North, El Paso, Texas 79928.” (RR:11-14, 25). On January 26, 2016, prior to his release, Herron signed a “CR-35 form” (*i.e.*, a registration form) as well as a “CR-32 form” (*i.e.*, a pre-release form), informing him of his sex-offender-registration duties, as Herron had been previously convicted of aggravated sexual assault of a child, subjecting him to lifetime sex-offender registration. (RR:21, 42, 44); (SX2–Texas Department of Public Safety (“DPS”) records, January 26, 2016, CR-35 and CR-32 forms).

Consistent with Ms. Spink's testimony regarding Herron's release to the halfway house, Herron's January 26, 2016, pre-release form described his "expected" physical address as "EPTTC 1700 Horizon Blvd. North, El Paso, TX 79928;" the words "El Paso Co S.O." were written under the section entitled "Local Law Enforcement Agency Name." (SX2-January 26, 2016, CR-32 form). The corresponding registration form for that date likewise described Herron's "physical address" as "EPTTC 1700 Horizon Blvd. North, El Paso TX 79928." (SX2-January 26, 2016, CR-35 form). The form reflected a checkmark designating this physical address as "urban." (SX2-January 26, 2016, CR-35 form).

Included within the January 26, 2016, pre-release form were several registration requirements, including that Herron: (1) pursuant to the section entitled "Registration," report to the "local law enforcement authority" (either the chief of police if residing within a municipality, or otherwise, the local sheriff) of the county where he resides or intends to reside for more than seven days; and (2) pursuant to the "change of address" section, no later than the seventh day before moving to a new residence, report in person both to his primary registration authority and his parole officer to inform them of his intended move. (SX2-January 26, 2016, CR-32 form).

Upon his arrival in El Paso on February 3, 2016, Herron was arrested on a parole-violation warrant when he went to a local motel instead of reporting directly to the halfway house. (RR:14-16). The next day, on February 4, 2016, Herron was transported to the El Paso County Sheriff's Office ("Sheriff's Office"), and after Detective Eduardo Gutierrez, Jr. ("Det. Gutierrez") reviewed his registration requirements with him, Herron completed his sex-offender registration and signed a new pre-release form, which contained the very-same registration requirements included in the one completed on January 26, 2016. (RR:16-17, 35-39); (SX3–February 4, 2016, CR-32 form). And just like the January 26, 2016, pre-release form previously signed by Herron, the February 4, 2016, pre-release form described Herron's expected physical address as "1700 Horizon, El Paso, TX 79928" and designated, a second time, "El Paso County Sheriff's Office" as the local law-enforcement agency with which Herron was to register. (SX3–February 4, 2016, CR-32 form). Under the category "Registering Agency ORI/Name," the corresponding February 4, 2016, registration form reflected the words "El Paso County Sheriff's Office." (SX3–February 4, 2016, CR-35 form).

Herron's parole violation and the subsequent June 24, 2016, pre-release and registration forms

As a result of his parole violation, Herron was transferred to the

Intermediate Sanctions Facility (“ISF”) in Brownfield, Texas. (RR:17-18). On June 24, 2016, prior to his June 27, 2016, release from ISF, Herron again signed and initialed a pre-release form, which designated his intended address as “1700 Horizon Blvd. North, El Paso County, Texas,” though, this time, the local law-enforcement agency name appearing on the form was “Horizon City Police Department” (“Horizon PD”). (RR:22-25); (SX2–June 24, 2016, CR-32 form). When he was released from ISF, Herron promptly fled from the authorities and removed his ankle monitor. (RR:19-20).

The “local law enforcement agency” with which Herron was required to register

Notwithstanding the June 24, 2016, pre-release form’s designation of Horizon PD as the “local law enforcement agency,” Ms. Spink, who had been employed by the Parole Division of the Texas Department of Criminal Justice (“TDCJ”) for fifteen years, eight-and-a-half of which were in a capacity as the parole-unit supervisor in charge of the sex-offender unit, testified that when Herron absconded, she immediately notified “the registering agency,” namely, Det. Gutierrez at the Sheriff’s Office (not Horizon PD). (RR:11-12, 19).

Thereafter, during cross-examination by Herron regarding the statutory requirements imposed on sex-offender registrants, Ms. Spink also explained that, pursuant to state law, “[e]very time [sex offenders] move to a new residence,

return, they have to register.” (RR:30). And shortly thereafter, when asked by Herron specifically, “who’s the **local law enforcement authority** [that he was] supposed to report to?”, Ms. Spink replied, “**Here in El Paso, it’s the El Paso County Sheriff’s Office.**” (RR:32)(emphasis added).³

Det. Gutierrez, a 20-year veteran Sheriff’s deputy then assigned to the Sheriff’s Office’s sex-offender-registration-and-tracking unit and whose job it was to “keep track and register all sex offenders that live in the jurisdiction of the El Paso County Sheriff’s Office and make sure that they are compliant with all stipulations [sic] under Chapter 62 [of the] Code of Criminal Procedure,” similarly identified the appropriate registration authority as the Sheriff’s Office, which had

³ In eliciting this testimony, defense counsel engaged in the following exchange:

[Defense Counsel]: Other than a prerelease form, is there a law, other than an agency rule, that might require him to re[-]register?

[Ms. Spink]: It’s not an agency rule; it’s state law.

* * *

[Defense Counsel]: Now, Ms. Spink, typically when somebody...that is required to register as a sex offender is about to be released, they go through a prerelease process, correct?

* * *

And they acknowledge where they’re supposed to go?

[Ms. Spink]: Right.

[Defense Counsel]: They acknowledge who they’re supposed to report to?

[Ms. Spink]: Right.

[Defense Counsel]: And that can often be a specific law enforcement agency, right?

* * *

[(referring to State’s Exhibit 3)] Who’s the **local law enforcement authority** he’s supposed to report to?

[Ms. Spink]: **Here in El Paso, it’s the El Paso County Sheriff’s [O]ffice.**
(RR:31-32)(emphasis added).

“jurisdiction at the halfway houses in Horizon.” (RR:36, 42).⁴

Det. Gutierrez also testified that, pursuant to Chapter 62 of the Texas Code of Criminal Procedure, Herron was required to report in person to the Sheriff’s Office even if, in violation of his pre-release instructions, Herron did not actually arrive in El Paso. (RR:39-40, 51); (SX2-3–January 26, 2016, February 4, 2016, and June 24, 2016 CR-32 forms).

In further explaining Herron’s registration requirements, Det. Gutierrez testified as follows:

[Prosecutor]: So what I’m specifically asking, if he does not move to an intended residence, who must he report to?^[5]

[Det. Gutierrez]: Okay. The **El Paso County Sheriff’s Office**.

[Prosecutor]: Why is that?

[Det. Gutierrez]: Because that’s what it says on the CR[-]32 form, that if he intends or does not intend to move to his address, he notifies us. He has to let us know. **“Us,” the sheriff’s office and/or parole[/] probation officer.**”

⁴ In this regard, Det. Gutierrez testified as follows:

[Prosecutor]: Why was he required to report to the El Paso County sheriff’s office as opposed to the El Paso Police Department?

[Det. Gutierrez]: Because we have jurisdiction at the—when I say “we”—the sheriff’s office has jurisdiction at the halfway houses in Horizon.

(RR:42).

⁵ Here, the prosecutor was specifically referring to the February 4, 2016, pre-release and registration forms contained in State’s Exhibit 3. (RR:51).

* * *

[Prosecutor]: Okay....the registration requirement, what does that tell the defendant he has to do?...

[Det. Gutierrez]: Okay...that if—a sex offender who resides in a municipality or county for more than seven days has to register either with the chief or the sheriff. **In this case, it would be the sheriff's office**, because he needs to stay—he needs to be living in our county for more than seven days.

(RR:51-52)(emphasis added).

After his release from ISF in June of 2016, Herron, yet again, failed to arrive in El Paso, failed to report to either his parole officer or the halfway house as instructed,⁶ failed to register his change of address with the Sheriff's Office as required, and was ultimately apprehended in a different county. (RR:19-20, 25-26, 40, 42, 49-50).

The trial court found Herron guilty as charged and sentenced him to the mandatory minimum sentence of 25 years' confinement. (RR:77, 79, 89).

⁶ As to Herron's failure to comply with his registration requirements after his June 2016 release from ISF, Det. Gutierrez testified as follows:

[Prosecutor]: And what day was he supposed to report to **you**?

[Det. Gutierrez]: No later than seven days after he was released from West Texas ISF.

[Prosecutor]: Which was when?

[Det. Gutierrez]: Which was 6/27 of 2016....[H]e needs to report to a **local law enforcement authority**.

(RR:44-45)(emphasis added).

SUMMARY OF THE STATE'S ARGUMENTS

By holding that, despite repeated instances of direct testimony that Herron was required to register with the Sheriff's Office, because the State failed to present direct evidence of *why* (as opposed to *that*) Herron was required to register with the Sheriff's Office, it thus failed to prove that Herron had an obligation to register with that agency (as alleged in the indictment), the Eighth Court did not apply the appropriate legal-sufficiency standard and thus erred.

It is well settled that, so long as the combined and cumulative force of *all* of the evidence, when viewed in the light most favorable to the verdict, could allow any rational fact-finder to find all the elements of the charged offense beyond a reasonable doubt, an appellate court must reject an appellant's legal-sufficiency claim. But here, the Eighth Court erred in failing to both afford the State the strongest legitimate view of the evidence and account for *all* of the relevant evidence to show that Herron was required to register with the Sheriff's Office.

First, because direct testimony of "X" fact is always legally sufficient to prove "X" fact, and the State presented ample direct testimony that Herron was required to register with the Sheriff's Office (as alleged in the indictment), the Eighth Court erred in holding that the evidence was legally insufficient to prove as much. And secondly, when all of the direct and circumstantial evidence is viewed

in its strongest probative context, there is sufficient evidence from which a rational fact-finder could conclude that Herron was, in fact, required to register with the Sheriff's Office (but failed to do so).

Thus, when the proper legal-sufficiency standard is applied, the evidence in this case was legally sufficient to prove the identity of the registration authority with which Herron was required to register, and the Eighth Court's holding to the contrary should be reversed.

ARGUMENT AND AUTHORITIES

SOLE GROUND FOR REVIEW: In holding the evidence legally insufficient to support the defendant's conviction for failing to register, specifically, that the State failed to prove that the defendant had a duty to register with the El Paso County Sheriff's Office, where there was at least "some evidence" (and specifically, direct evidence of the fact) that the Sheriff's Office was the "local law-enforcement agency" with which Herron was required to register, rather than decide merely whether there was legally sufficient evidence that, when viewed in its proper context and in the light most favorable to the verdict, could support a rational inference that Herron was, indeed, required to register with the Sheriff's Office, the Eighth Court improperly required the State to meet its evidentiary burden via the Court's preferred manner of evidentiary proof, effectively increasing the State's burden.

- I. The Eighth Court failed to conduct a proper legal-sufficiency analysis when it failed to afford the State the strongest legitimate view of *all* of the evidence presented to show that the Sheriff's Office was the "local law-enforcement agency" with which Herron was required to register.**

Article 62.051 provides that a person who has a reportable conviction is required to register with the local law-enforcement authority in any municipality or county in which the person resides, or intends to reside, for more than seven days. TEX. CODE CRIM. PROC. art. 62.051(a). Article 62.001(2) defines "local law enforcement authority" as "...the office of the chief of police of a municipality, the office of the sheriff of a county in this state, or a centralized registration authority." *See* TEX. CODE CRIM. PROC. art. 62.001(2). Articles 62.004 and 62.0045, in turn, provide that a registrant's "primary registration authority" shall be determined by DPS based on the municipality or county in which he resides,

unless a specific entity (either the chief of police or the county sheriff) has been designated by the commissioners court as the mandatory countywide registration location (*i.e.*, “centralized registration authority”), in which case, the person must register with the centralized registration authority, regardless of whether the person resides within a municipality. *See* TEX. CODE CRIM. PROC. arts. 62.004(a)-(a-1); 62.0045(a).

Pursuant to these statutory provisions, the Eighth Court held that the evidence was legally insufficient to sustain Herron’s failure-to-register conviction, reasoning that, absent evidence speaking directly to the statutory criteria for determining which of “three possible entities at which a sex offender must register,” the State failed to prove that Herron was required to register with the “El Paso County Sheriff,” as alleged in the indictment. *See Herron*, 2019 WL 3451031 at *3 (with respect to whether the Sheriff’s Office had been designated by DPS as the local registration authority, reasoning that “No one testified to that. Nor did the pre-release form or any other exhibit indicate as much.”).

However, while the State does not dispute that the identity of the law-enforcement entity with which a registrant is required to register is subject to several statutory delineations, a reading of the Eighth Court’s opinion reveals that the Eighth Court failed to apply the proper legal-sufficiency standard in two

fundamental respects: (1) it omitted from its analysis the vast majority of the evidence relevant to proving the identity of the proper law-enforcement registration authority; and (2) it took an impermissibly narrow view of the relevant evidence that it did consider. In doing so, the Eighth Court effectively increased the State's burden, and its judgment of acquittal should thus be reversed.

A. The Eighth Court erred when it omitted from its analysis the vast majority of the evidence identifying the Sheriff's Office as the proper registration authority.

It is well settled that, when reviewing the legal sufficiency of the evidence to support a conviction, the reviewing court must view all of the evidence collectively and in the light most favorable to the verdict. *See, e.g., Braughton v. State*, 569 S.W.3d 592, 608 (Tex.Crim.App. 2018); *Adames v. State*, 353 S.W.3d 854, 860 (Tex.Crim.App. 2011). Accordingly, the role of the reviewing court is neither to dismiss the existence of reasonable inferences based on isolated pieces of evidence nor to reevaluate the weight and credibility of the evidence. *See Merritt v. State*, 368 S.W.3d 516, 526 (Tex.Crim.App. 2012); *Isassi v. State*, 330 S.W.3d 633, 638 (Tex.Crim.App. 2010)(cases holding that a proper legal-sufficiency review requires the examination of the combined and cumulative force of all of the evidence and prohibits taking a “divide-and-conquer” approach). Rather, the court's role is limited to determining whether the cumulative force of

all of the evidence provides a basis from which the inferences necessary to finding guilt can reasonably be made. *See Braughton*, 569 S.W.3d at 608 (quoting and citing *Adames*, 353 S.W.3d at 860).

But here, the Eighth Court failed to account for *all* of the evidence presented by the State to show that Herron had a duty to register with the Sheriff's Office (as opposed to some other entity), instead narrowing its analysis to a mere portion of the evidence and thereafter impermissibly concluding that such isolated portions of the evidence were legally insufficient to prove the registration-authority element of the charged failure-to-register offense.

For instance, while the Eighth Court clearly considered in its analysis the February 2016 pre-release form directing Herron to register with the Sheriff's Office, as well as Det. Gutierrez' purportedly "conclusory" statement that Herron was required to register with the Sheriff's Office because it had "jurisdiction" over the halfway house in which Herron was to reside, *see Herron*, 2019 WL 3451031 at *4-5, wholly omitted from the Eighth Court's sufficiency analysis was the following additional evidence:

- that **twice**, prior to his June 2016 release from ISF, Herron signed a pre-release form describing his intended address as either "1700 Horizon Blvd. North, El Paso, Texas 79928" or "EPTTC 1700 Horizon Blvd. North, El Paso, TX 79928," and designating the Sheriff's Office as the corresponding "local law-enforcement agency"

with whom he was required to register, (SX3–January 26, 2016, and February 4, 2016, CR-32 forms);

- that it was undisputed that the Horizon City halfway house at which Herron was required to reside upon his release in both February and June of 2016 was located at 1700 Horizon Blvd. North, (RR:25); (SX3–January 26, 2016, CR-32 form; February 4, 2016, CR-32 and CR-35 forms);
- that even though the January 2016 registration form had an annotation that the Horizon City address was “urban,” it designated the Sheriff’s Office as the applicable registration authority, (SX2–January 26, 2016, CR-35 form);
- that having previously been released to the very-same Horizon City halfway house in February of 2016, Herron, in fact, registered with the Sheriff’s Office, (RR:12-13, 29, 32);
- that the February 2016 registration form named the Sheriff’s Office as the “registering agency,” (RR:16, 36-37); (SX3–February 4, 2016, CR-32 and CR-35 form);
- that prior to his June 2016 release from ISF, Herron’s new pre-release form included the same physical address (that of the Horizon City halfway house) that appeared in his two prior pre-release forms from January and February of 2016, (SX2–January 26, 2016, February 4, 2016, and June 24, 2016, CR-32 forms, all describing Herron’s assigned address as “1700 Horizon Blvd. North”);
- that Ms. Spink, a fifteen-year veteran TDCJ employee with an eight-and-a-half-year tenure as a parole-unit supervisor in charge of the sex-offender unit, testified that the Sheriff’s Office was the “registering agency” with whom Herron was required to register upon his release to the Horizon City halfway house, (RR:19–wherein Ms.

Spink testified she notified Det. Gutierrez of the Sheriff's Office when Herron absconded because it was "common practice for the parole division to notify the **registering agency**")(emphasis added);

- that while being questioned regarding Herron's registration requirements under state law, specifically, "who's the **local law enforcement authority** [that he was] supposed to report to?", and after agreeing that registrants are required to report to "a *specific* law enforcement agency," Ms. Spink replied, "**Here in El Paso, it's the El Paso County Sheriff's Office.**" (RR:30, 32)(emphasis added);
- that Det. Gutierrez, a 20-year veteran Sheriff's deputy then assigned to the Sheriff's Office's sex-offender-registration-and-tracking unit, who testified it was his job to "keep track [of] and register all sex offenders that live in the jurisdiction of the El Paso County Sheriff's Office and make sure that they are compliant with all stipulations [sic] under Chapter 62 [of the] Code of Criminal Procedure," also testified that, rather than registering with the El Paso Police Department, Herron had to register with the Sheriff's Office because it had "jurisdiction at the halfway houses in Horizon[,]" (RR:36, 42);
- that in response to a question about the "registration requirement" that was explained to Herron during his February 2016 registration, Det. Gutierrez related that a sex offender has to register with either the chief of police or the sheriff and that, "**[i]n this case, it would be the sheriff's office**, because he needs to be living in our county for more than seven days[,]" (RR:52)(emphasis added); and
- that when asked "who must [Herron] report to?" if he did not move to the intended address as indicated, Det. Gutierrez replied, "Okay. The El Paso County Sheriff's Office."

(RR:51-52)(emphasis added).⁷

And as will be discussed below, because, when viewed in its totality and in the proper context, this evidence was at least “some evidence” that Herron had a duty to register with the Sheriff’s Office, the Eighth Court erred in holding that there was legally insufficient evidence to prove as much.

B. The Eighth Court erred in failing to view the evidence in the light most favorable to the verdict and defer to the trial court’s resolution of any conflicts in the evidence in favor of its guilty verdict.

1. The direct evidence that Herron was required to register with the Sheriff’s Office, specifically, was alone legally sufficient to prove Herron’s duty to register with the El Paso County Sheriff, as alleged in the indictment.

As is well settled, regardless of whether a reviewing court believes the defendant’s evidence outweighs or is more compelling than that of the State, so long as there is “some evidence” that, when viewed in the light most favorable to the verdict, along with all reasonable inferences therefrom, could allow any rational fact-finder to find all the elements of the charged offense beyond a

⁷ The State notes that in his appellate brief, Herron did not challenge the legal-sufficiency of the *identity* of the Sheriff’s Office as the proper registration authority; rather, he challenged the sufficiency of the evidence only as to *notice* of his duty to register with the Sheriff’s Office. See (Appellant’s Br. at 6, 8-9, 13—wherein Appellant argued that because the June 24, 2016, pre-release form instructed him to report to Horizon PD, he “never received notice” that he needed to report to the Sheriff’s Office, such that the State failed to prove the *mens rea* element of the offense).

reasonable doubt, an appellate court must reject an appellant's legal-sufficiency claim. *See, e.g., Matlock v. State*, 392 S.W.3d 662, 672 (Tex.Crim.App. 2013)(explaining that an appellate court is "required to first decide if there was 'some evidence' to support a reasonable jury's finding [of an elemental fact]" and that, "If there was some evidence, then the court must reject appellant's legal sufficiency claim."); *Matson v. State*, 819 S.W.2d 839, 846 (Tex.Crim.App. 1991); *Wicker v. State*, 667 S.W.2d 137, 143 (Tex.Crim.App. 1984).

And as this Court held in *Goodman v. State*, 66 S.W.3d 283, 286 (Tex.Crim.App. 2001), "[d]irect evidence of 'X' fact is *always* legally sufficient to support a finding of 'X' fact[.]" even if its source is particularly untrustworthy, and even if there is conflicting evidence from a more-credible source. *See Goodman*, 66 S.W.3d at 285-86 (wherein this Court explained that direct testimony by "Cretan Liar" of fact "X" is always legally sufficient to prove that fact, even if contradicted by the testimony of "a dozen boy scouts")(emphasis added).

But here, despite repeated instances of direct testimony that Herron was required to register with the Sheriff's Office, the Eighth Court held that the evidence was legally insufficient to show that Herron, in fact, had such an obligation. *See Herron*, 2019 WL 3451031 at *5. As noted above, Ms. Spink

testified that when Herron absconded in February of 2016, she informed the Sheriff's Office, which she described as the "registering agency," and when questioned specifically, "[W]ho's the local law enforcement authority that [Herron was] supposed to report to?", agreeing that registrants are required to report to "a *specific* law enforcement agency," she also testified that, "Here in El Paso, it's the El Paso County Sheriff's Office." (RR:19, 30, 32)(emphasis added). This was direct evidence that Herron was specifically required to register with the Sheriff's Office, and under *Goodman*, it was legally sufficient evidence in support of the State's indictment allegation to that effect. *See Goodman*, 66 S.W.3d at 285-86.

Det. Gutierrez likewise testified—specifically, with regard to Herron's "registration requirement"—that a sex offender has to register either with the chief of police or the local sheriff, but that, "In this case, it would be the sheriff's office...." (RR:52). And when asked to what agency Herron was required to report if he did not complete an intended change of address, Det. Gutierrez, again, replied, "The El Paso County Sheriff's Office." (RR:51-52). This was yet additional direct evidence that Herron was required to register with the Sheriff's Office, as alleged by the State in its indictment, and thus also legally sufficient to show that the Sheriff's Office was the proper registration authority with which Herron was required to (but did not) register. *See Goodman*, 66 S.W.3d at 285-

86.

Thus, insofar as the Eighth Court, having omitted this evidence from its analysis, held that the evidence presented was legally insufficient to show the Sheriff's Office's identity as the proper "local law-enforcement agency" with which Herron was required to register, such a holding amounted to an impermissibly narrow view of the evidence. *See Villa v. State*, 514 S.W.3d 227, 233 (Tex.Crim.App. 2017)(where this Court held the Eighth Court erred in failing to defer to an evidence-supported inference consistent with guilt simply because the witness did not expressly state the elemental fact).

For these reasons alone, the evidence was legally sufficient to show that Herron was required to register with the Sheriff's Office as alleged in the indictment, and the Eighth Court's holding to the contrary was thus erroneous and should be reversed.

2. When viewed in its full context and in the light most favorable to the guilty verdict, contrary to the Eighth Court's holding, the evidence presented was legally sufficient to show that Herron was specifically required to report to the Sheriff's Office, as alleged in the indictment.
 - a. *The Eighth Court failed to perform a proper legal-sufficiency analysis.*

In concluding that the State had failed to prove the identity of the proper

registration authority with which Herron was required to register, the Eighth Court reasoned that, while the State did prove that Herron failed to register with the Sheriff's Office, whether, based on the geographic location of the halfway house in which he intended to reside, Herron was actually required under Chapter 62 to register with the Sheriff's Office in the first place was a matter unaddressed by the evidence. *See Herron*, 2019 WL 3451031 at *4. The Eighth Court appears to have based its holding on the fact that, with respect to the June 2016 pre-release form, "[n]o one testified to" whether DPS selected Horizon PD as the proper registration authority, as well as the fact that the pre-release forms directing Herron to register with the Sheriff's Office "did not say anything suggesting that he had to register there because the halfway house lay in an unincorporated area" (as provided by 62.051(a)). *See Herron*, 2019 WL 3451031 at *3-4.

In other words, the Eighth Court criticized the evidentiary validity of the State's proof of the elemental fact at issue (that Herron was required to register with the Sheriff's Office), not because the necessary inference could not reasonably be made from it, but because it did not conform to a specific manner of proof preferred by the court—evidence of *why* Herron was required to register with the Sheriff's Office (and not just *that* he was required to register there). But again, in doing so (and contrary to the proper legal-sufficiency standard), the

Eighth Court engaged in an impermissible re-weighing of the evidence, failed to afford the State the strongest legitimate view thereof, and effectively increased the State's burden.

The following statements by the Eighth Court serve to further illustrate its flawed analysis; in reasoning that, while the State did prove that Herron did not, in fact, register with the Sheriff's Office, the State failed to prove that he likewise failed to register with Horizon PD, the Eighth Court stated, "[N]othing was said or presented about whether [Herron] registered elsewhere, such as with [Horizon PD]. Indeed, the only witness discussing whether [Herron] registered upon his June 2016 release from ISF conceded that he did not know if [he] actually registered with any authority. That is, the sheriff's detective answered 'correct' when asked: 'so you wouldn't know if he had reported anywhere or not, correct?'" *Herron*, 2019 WL 3451031 at *3. But this is an impermissibly narrow view of the record, which shows that this affirmative response by Det. Gutierrez was made in the context of being asked whether, with respect to Herron's whereabouts *outside* of El Paso County after he absconded in June of 2016, Det. Gutierrez was aware of whether Herron had registered anywhere. (RR:53).⁸ Thus, contrary to the Eighth

⁸ The response alluded to by the Eighth Court occurred during the following exchange:
[Defense Counsel]: How many counties in Texas?
[Det. Gutierrez]: How many counties in Texas?

Court's reasoning, viewed in the light most favorable to the guilty verdict, such a response by Det. Gutierrez was not truly a "concession" that he did not know whether Herron had ever failed to register with either the Sheriff's Office or Horizon PD at any of the pertinent times, but rather, it was a statement that he did not know whether Herron, having absconded and never having arrived in El Paso after his June 2016 release from ISF, registered with any authority outside of El Paso County.

Similarly, the Eighth Court's assertion that "nothing was said or presented about whether [Herron] registered elsewhere, such as with the [Horizon PD]," *Herron*, 2019 WL 3451031 at *3, is likewise based on an impermissibly narrow view of the evidence, which, viewed collectively and in the light most favorable to the State, shows that Herron failed to register with *any* law-enforcement authority in El Paso County. As related in the pre-release and registration forms, Det. Gutierrez and Ms. Spink testified that Herron was required to register *in person*, even if, in violation of his pre-release instructions, he did not actually arrive in El

[Defense Counsel]: Yeah.
[Det. Gutierrez]: I don't know.
[Defense Counsel]: After June the 27th, you didn't know where he was, correct?
[Det. Gutierrez]: Correct.
[Defense Counsel]: So you wouldn't know if he had reported anywhere or not, correct?
[Det. Gutierrez]: **Correct.**
(RR:53)(emphasis added).

Paso and report to the halfway house. (RR:24, 39-40); (SX2-3–January 26, 2016, February 4, 2016, and June 24, 2016 CR-32 forms). And Det. Gutierrez also testified that, “When [Herron] was released from West Texas ISF, he was never returned to El Paso County....After February 4th, 2016, he was here in El Paso County. He left El Paso County, never returned to El Paso County after June...27, 2016.” (RR:49-50). Thus, it can at least fairly be inferred from the record that, if Herron was required to register in person, and he never physically returned to El Paso County after his June 2016 release from ISF, Herron did not register with either the Sheriff’s Office or Horizon PD. And as such, the Eighth Court’s assertion that “nothing was said” about whether Herron reported to another El Paso law-enforcement authority further evinces the Eighth Court’s misapplication of the proper standard of review.

b. *The Eighth Court’s reliance on Simpkins is misplaced.*

So, too, did the Eighth Court err in relying on *Simpkins v. State*, 300 S.W.3d 860, 863 (Tex.App.–Texarkana 2009, no pet.), to hold that the State failed to prove the identity of the proper registration authority because it failed to present specific evidence on whether the Horizon City halfway house was located within an unincorporated area of El Paso County. *See Herron*, 2019 WL 3451031 at *4. In *Simpkins*, the defendant was indicted for failing to register with the local law-

enforcement authority in Gregg County. *See Simpkins*, 300 S.W.3d at 863. The only witness that testified about Gregg County’s law-enforcement registration authorities (described by the court as “a criminal investigator with the Gregg County Sheriff’s Department”) testified that there were two: the Sheriff’s Department for registrants residing in an unincorporated area of Gregg County, and the Longview Police Department for registrants living within the City of Longview. *Id.* at 861 n.2, 864. The State presented evidence that the defendant had failed to register with the Gregg County Sheriff. *Id.* at 864. However, the testimony presented showed that the street on which the defendant lived lay partially inside the City of Longview and partially outside, and witnesses could not confirm whether the defendant’s specific address was on a part of the street that lay outside the city limits (in which case, he would be required to register with the sheriff). *Id.* at 864-65. Thus, the *Simpkins* Court concluded that the State failed to show that the defendant was required to register with the Gregg County Sheriff’s Department. *Id.* at 865.

But unlike in *Simpkins*, there was no similar evidence in this case to show that Herron might be required to register with different law-enforcement entities depending on the particular locale of the halfway house within El Paso County. Indeed, unlike the testimony in *Simpkins*, in which the witness affirmatively stated

that there were two registration authorities within the county, the testimony presented in this case demonstrated that when a registrant resided or intended to reside inside El Paso County, he was required to register only with the El Paso County Sheriff's Office. And unlike the "criminal investigator" who supplied the testimony about Simpkins' registration requirements, the two witnesses who testified in this case that Herron was required to register with the Sheriff's Office were knowledgeable in the registration requirements of El Paso County, having a combined 35 years of law-enforcement and corrections experience, including in a capacity wherein they were charged with overseeing and investigating sex-offender-registration compliance. And thus, because the evidence in this case shows that there was only one registration authority within El Paso County, such that the identity of the "local law enforcement" authority did not vary depending upon the situs of Herron's residence (as was the case in *Simpkins*), the State was not required here to prove such pinpoint specificity as that required by the Eighth Court. See *McBurnett v. State*, No. 01-11-001-83-CR, 2012 WL 3228813, at *2 (Tex.App.—Houston [1st Dist.] Aug. 9, 2012, no pet.)(mem.op., not designated for publication)(discussing and distinguishing *Simpkins* and rejecting appellant's legal-sufficiency claim that, under *Simpkins*, the State was required to prove that he was residing inside the Houston city limits, where the uncontroverted testimony

was that the registration authority alleged in the indictment was the proper registration authority designated by DPS).

And as will be discussed below, that the State did not opt to prove the identity of the Sheriff's Office as the proper registration authority via specific, direct testimony that it was "designated" as Herron's "primary registration authority" by either the commissioners court or DPS did not preclude the fact-finder from concluding, based on the combined and cumulative force of the evidence presented, that the Sheriff's Office was, indeed, the registration authority with which Herron was required to register.

- c. *The combined and cumulative force of the evidence admitted, viewed in the light most favorable to the guilty verdict, showed that Herron was, indeed, required to register with the Sheriff's Office.*

Rejecting the legal sufficiency of the evidence to support the Sheriff's Office's identity as the registration authority with which Herron was required to register, the Eighth Court reasoned that Det. Gutierrez' statement that Herron was required to register with the Sheriff's Office because it had "jurisdiction at the halfway houses in Horizon" was merely "conclusory" and lacking in "context" that could lend any evidentiary support. *See Herron*, 2019 WL 3451031 at *5. But this assertion by the Court is also refuted by the record, which shows that Det.

Gutierrez made the statement in the course of explaining why it was the Sheriff's Office, specifically, with which Herron was required to register, and not another agency (such as, for instance, the El Paso Police Department). (RR:42—wherein Det. Gutierrez, in response to the prosecutor's question about why Herron was required to report to the Sheriff's Office, as opposed to the El Paso Police Department, testified that it was because "we have jurisdiction at the...halfway houses in Horizon").

Moreover, contrary to the Eighth Court's implication, the most favorable view of the evidence shows that this "jurisdiction" statement was not made in the ordinary, general law-enforcement sense. Rather, the statement was made in the course of describing Herron's sex-offender registration requirements and by a seasoned law-enforcement officer whose specific occupation was to "keep track [of] and register all sex offenders that live in the jurisdiction of the El Paso County Sheriff's Office and make sure that they are compliant with all stipulations [sic] **under Chapter 62 [of the] Code of Criminal Procedure.**" (RR:36, 40-42)(emphasis added). Indeed, Det. Gutierrez' statement about "jurisdiction" was received on the heels of his earlier testimony, in which he explained that when registrants are released from prison and "transferred from one jurisdiction to El Paso County" (such as Herron was), "they come in and register with the local law

enforcement authority just as stipulated in Chapter 62.” (RR:41). And importantly, Det. Gutierrez’ testimony that, “[A] sex offender who resides in a municipality or county for more than seven days has to register either with the chief or the sheriff. In this case, it would be the sheriff’s office, because...he needs to be living in our county for more than seven days,” (RR5:51-52)—which was remarkably similar to article 62.051’s language, stating that “a person required to register...shall register...with the local law enforcement authority in any municipality where the person resides or intends to reside for more than seven days [, and] [i]f the person does not reside or intend to reside in a municipality, [he] shall register...in any county where the person resides or intends to reside for more than seven days,” TEX. CODE CRIM. PROC. art. 62.051(a)—indicated that he was aware of the county-versus-municipality statutory rule set forth in article 62.051, and that, armed with such specialized knowledge, Det. Gutierrez ultimately determined that Herron was required to register with the Sheriff’s Office.

Certainly, when properly considered in this context, Det. Gutierrez’ statement regarding the Sheriff’s “jurisdiction” was sufficient to allow the fact-finder to conclude that the Sheriff’s Office was the proper registration authority with which Herron was required to register under Chapter 62, especially given that

Det. Gutierrez described his occupation in terms of monitoring sex-offenders' compliance with their registration requirements "under Chapter 62 [of the] Code of Criminal Procedure". (RR:36).⁹ See *Turner v. State*, 101 S.W.3d 750, 761 (Tex.App.–Houston [1st Dist.] 2003, pet. ref'd)(where appellant similarly claimed that the evidence was legally insufficient to prove he failed to register every 90 days, as required by law, because the witness' (a DPS sergeant investigator's) "unsupported testimony" that appellant's prior felony sodomy conviction was a "sexually violent offense" for purposes of the statute was "not enough to make it so," holding that the witness' response, "yes," when asked if appellant's previous convictions were sexually violent offenses, was not unsupported or conclusory because the context of the witness' other testimony, including that he was tasked with investigating sex-offender-registration compliance, that he had received a 40-hour training course on the subject, and that he had concluded from his investigation that appellant had failed to comply with his registration requirements, showed that he had "specialized knowledge of the requirements of the sex-offender-registration statutes and had personal knowledge of the specific

⁹ And in a similar way, in light of Ms. Spink's occupation as a sex-offender-parole-unit supervisor and her resulting knowledge of the statutory law in that regard, her testimony (made in response to being asked about the specific "local law enforcement authority [that Herron was] supposed to report to") that, "Here in El Paso, it's The El Paso County Sheriff's Office," (RR:32), also supports the fact-finder's conclusion that the Sheriff's Office was the proper registration authority in this case.

details of appellant's registration requirement").

And to any extent Det. Gutierrez' "jurisdiction" statement could be deemed ambiguous, the existence and/or weight of any such ambiguity was a question for the fact-finder, and the Eighth Court should have deferred to that determination by the trial court in favor of the State. *See Smith v. State*, 340 S.W.3d 41, 48-49 (Tex.App.-Houston [1st Dist.] 2011, no pet.)(holding that because it was unclear if the witness' ambiguous reference to "this last summer" referred to the summer of 2007 or 2008, the jury could have reasonably reconciled this ambiguity in such a way as to support its guilty verdict); *see also Queeman v. State*, 520 S.W.3d 616, 622 (Tex.Crim.App. 2017)(holding that the reviewing court must presume that the jury resolved any such conflicts in favor of the verdict).

Likewise, to any extent the June 24, 2016, pre-release form's designation of Horizon PD as the "local law enforcement agency" could show that Herron was not required to register with the Sheriff's Office, at best, such was a mere conflict in the evidence, which the trial court was free to resolve in favor of the multitudinous other evidence identifying the Sheriff's Office as the proper registration authority. *See Queeman*, 520 S.W.3d at 622; *Isassi*, 330 S.W.3d at 638 (cases holding that the reviewing court should presume that the fact-finder resolved any conflicts in the evidence in favor of the prevailing party).

Moreover, the above-discussed additional circumstantial evidence, which included the January 2016 and February 2016 pre-release forms (designating the Sheriff's Office as the corresponding registering agency for the very-same 1700 Horizon North Blvd. address to which Herron was finally released in June of 2016), the fact that Herron had previously registered with the Sheriff's Office on February 4, 2016 (when he was to reside at the very-same 1700 Horizon Blvd. North address), and the February 2016 registration form's designation of the Sheriff's Office as the "registering agency," all of which tended to show that the proper registration authority corresponding to the Horizon City halfway house was the Sheriff's Office, further corroborated Ms. Spink's and Det. Gutierrez' identification of the Sheriff's Office as the proper registration authority.

Simply, that the Eighth Court would have preferred that the State's witnesses expressly describe the identity of the Sheriff's Office as the proper registration authority in terms of the applicable statutory definition—that is, by explaining the underlying reasons as to why the Sheriff's Office was the registration authority corresponding to Herron's intended address at the Horizon City halfway house under Chapter 62 (for instance, either because DPS or the commissioners court had designated it as Herron's primary registration authority or centralized registration authority, respectively)—in no way lessens the

legitimacy of the evidence (direct or otherwise) actually presented, which, when considered in a proper legal-sufficiency analysis, was sufficient to allow, at the very least, a rational inference that the Sheriff's Office was the agency with which Herron was required to register.

And thus, because the evidence would allow a rational fact-finder to conclude that Herron was required to register with the Sheriff's Office, the evidence was legally sufficient to prove the Sheriff's Office's identity as the proper registration authority (as alleged in the indictment), and the Eighth Court's contrary holding was thus erroneous and should be reversed.

II. Conclusion

For all of these reasons, the Eighth Court, having omitted from its analysis the vast majority of the relevant evidence, and thereafter having failed to afford the State the strongest legitimate view of the evidence, erred in holding that the State failed to present legally sufficient evidence to show that Herron was required to register with the Sheriff's Office, as alleged in the indictment. As such, the Eighth Court's judgment of acquittal should be reversed, and Herron's conviction should be affirmed.

PRAYER

WHEREFORE, the State prays that this Court reverse the Eighth Court's judgment, hold the evidence legally sufficient to support Herron's failure-to-register conviction, and affirm Herron's conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the factual summary on page 1 through and including the prayer for relief on page 33, contains 7,386 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Raquel López

RAQUEL LOPEZ

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on October 25, 2019, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to appellant's attorney: Kenneth Del Valle, kendelvalle@aol.com.

(2) The undersigned also does hereby certify that on October 25, 2019, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Raquel López

RAQUEL LOPEZ